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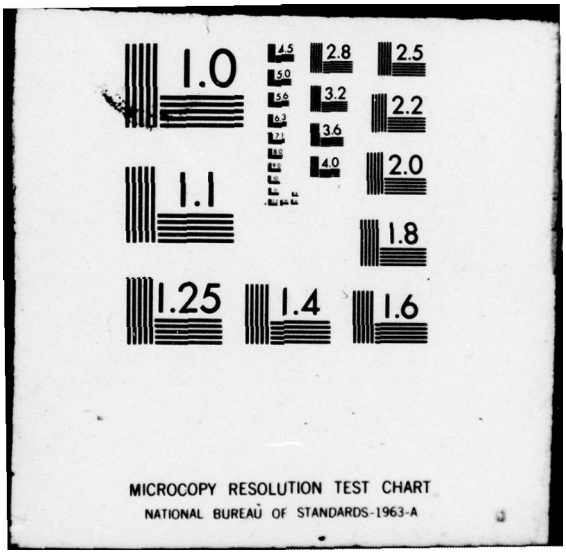
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LEVEL II

STUDY PROJECT

21 April 1979

EXTRATERRITORIAL JURISDICTION AND APPLICATION OF THE FIRST-FOUND OR FIRST-BROUGHT STATUTE

by

Colonel Gary D. Jackson

US ARMY WAR COLLEGE, CARLISLE BARRACKS, PA 17013

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Within the past century, the United States has assumed a position as a world power. This status has resulted in multitudes of Americans being located throughout the earth. This, in turn, has created legal problems concerning extraterritorial jurisdiction of criminal statutes of the United States.

This paper attempts to discuss theories under which such jurisdiction is exercised by nation-states, to present examples of the use of such legal doctrine by other nations, to

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trace developments in the United States in this field of law, and to examine the results of legislation that defines the proper court for trial of such cases in the United States.

The paper concludes that foreign nations have had little problem in giving their criminal statutes extraterritorial application and that the United States is belatedly catching up. More and more United States courts are holding that US criminal statutes, over and above military courts martial authority, can be applied abroad against citizens of the United States.

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USAWC MILITARY STUDIES PROGRAM PAPER

EXTRATERRITORIAL JURISDICTION AND APPLICATION OF THE FIRST-FOUND OR FIRST-BROUGHT STATUTE

INDIVIDUAL STUDY PROJECT

by

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21 Apr 1979

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A B O U T T H E A U T H O R

Gary D. Jackson holds a commission as a Colonel in the United States Army Reserve and wrote this paper as a special study while on temporary duty to attend the U. S. Army War College during Academic Year 1979. He was originally commissioned in the infantry after graduation from Officer's Candidate School, Fort Benning, Georgia. He is a graduate of the Advanced Infantry Officer's Course, the Judge Advocate General's Officer Career Course, the Reserve Component General Staff Course at the JAGC School and the Military Intelligence Officer Branch Qualification Correspondence Course. He held a commission in the JAGC Corps and is presently in the MI Branch.

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A U T H O R I T I E S

DECISIONS IN CASES IN FOREIGN COUNTRIES

OTHER AUTHORITIES

EXTRATERRITORIAL JURISDICTION AND APPLICATION OF THE FIRST-FOUND OR FIRST-BROUGHT STATUTE

Within the past century, the United States has assumed a position as a world power. The attainment and retention of this status has required substantial commitment of personnel and resources around the globe. Wartime and peacetime alike have found millions of citizens dispersed in virtually every nation of the earth. Government officials, military personnel, and private citizens representing commercial, industrial, artistic, cultural and humanitarian interests, as well as ordinary travelers, are regularly found in huge numbers on every continent.

The international role of the United States has created legal problems and consequences unforeseen just a few decades ago. The need for legal control of the actions of both government representatives and non-government personnel, particularly those actions constituting criminal conduct, has forced Congress, the executive branch and the courts to struggle with the problem of extraterritorial application of criminal statutes of the United States Code. Coincidental with this problem has been the equally vexing one of determining in which court an accused should be tried when a federal statute has extraterritorial application. This paper will attempt to discuss

the theories under which nation-states exercise or attempt to exercise extraterritorial jurisdiction, to present examples of the use of such legal doctrine by other nations, to trace developments in the extraterritorial application of United States criminal statutes, and to examine the results of legislation that defines the proper court for trial of such cases in the United States.

THEORIES AND PRINCIPLES

From the time of the emergence of nation-states, the theory was advanced and totally accepted in practice that nations were independent, sovereign, and master over conduct within their land areas. The practice became universally recognized as a principle by which nations governed within their borders. This basic principle has been consistently followed in this country. United States courts have held that each nation has jurisdiction over offenses committed within its own territory[1]; a sovereign nation has exclusive jurisdiction to punish offenses against its law committed within its borders, unless by consent it surrendered such jurisdiction[2], jurisdiction depends on where a crime is committed[3]; and the general rule is that a crime must be committed within the territorial jurisdiction of a sovereignty seeking to try the offense or it does not have jurisdiction[4]. This simple rule of territorial jurisdiction has been strained by the complexities of the world and the desire of nations to extend authority over their nationals and others beyond their national borders. Thus arose new jurisdictional theories. By 1935, ample legal precedent existed to support the conclusion, by a Harvard Research

Project, that five principles were being applied to establish criminal jurisdiction. The Research Project determined that jurisdiction was based upon one or more of the following[5]:

> . . . [1st], the territorial principle, determining jurisdiction by reference to the place where the offence is committed; . . .
>
> . . . [2nd], the nationality principle, determining jurisdiction by reference to the nationality or national character of the person committing the offence; . . .
>
> [3rd], the protective principle, determining jurisdiction by reference to the national interest injured by the offence; . . .
>
> [4th], the universality principle, determining jurisdiction by reference to the custody of the person committing the offence; and . . .
>
> [5th], the passive personality, determining jurisdiction by reference to the nationality or national character of the person injured by the offence.

Obviously, the original concept of exclusive territorial jurisdiction has been substantially altered by the actual or implied adoption of these additional principles.

The convenient list of five categories becomes more complex in practice, however. For instance, even the territorial principle has actually been construed to mean two different principles. These have been designated the "subjective" and the "objective" views of the territorial principle[6]. The former extends jurisdiction over all persons within the geographical confines of the nation state who violate its law there. The objective view extends the jurisdiction to cover all acts which take effect within the sovereign although the actor is without the nation's boundaries, i.e., the conventional story of A, stand-in state X, shoots B in state Y.

Furthermore, as will be evident from some of the opinions cited and discussed in this paper, often times the real means by which jurisdiction attaches is not clear. A court may review the five categories and determine that a particular one vests jurisdiction when a close examination of the reasoning reflects that another principle was also invoked or at least involved. Further confusion has developed over dististinguishing some principles from others. For example, the objective territorial principle occasionally has been cited when the ruling actually adopts the passive personality principle. This confusion probably results from similarities between the two. The objective territorial principle requires effect within the prosecuting nation by action from without, whereas the passive personality principle determines jurisdiction by the nationality or national character of the harmed party of the prosecuting nation even though the criminal act may have been committed elsewhere. Even after close scrutiny of some opinions, particularly those not citing the principle being invoked, a reader could reasonably conclude that either or both were being used.

EXTRATERRITORIAL APPLICATION BY FOREIGN NATIONS

Modern nations have seemingly avoided some of the problems faced by the United States and have applied criminal laws extraterritorily without much concern for the legal basis. In fact, most of the "principles", other than the territorial one, have been "found" in foreign jurisdictions. Later, one or more of them have been adopted by the United States.

The experience of foreign nations in asserting or declining to assert jurisdiction in specific instances and cases will follow. As accurately as possible from these examples, the instances and cases will be classed according to the principle invoked to attach jurisdiction or discussed in denying power to try the accused or the offense. Sometimes the dividing line is indistinct and these circumstances will be noted where appropriate.

1. THE TERRITORIAL PRINCIPLE

The territorial principle by its very nature forms the basis by which most criminal prosecutions are brought by any nation. Glanville Williams, in a 1965 article[7], listed these four reasons for this predominance as follows:

a. The nation in which the crime was committed generally has the greatest interest in prosecuting the offender.

b. The offender will most likely be in the nation in which the crime occurred.

c. The nation in which the offense was committed is the most convenient forum since witnesses and other evidence would be located there.

d. Legal systems and laws vary greatly from one country to another. Uniformity of the application of the "law" necessitates or at least encourages that only one body of law be in force at any one time.

Since the authority derived from sovereign control over events and conduct within a land area is the basis for most criminal prosecutions, it is not surprising that many of the examples of foreign nations asserting or denying jurisdiction evolve from

application of the territorial principle.

A Netherlands Court of Appeal considered extraterritorial application of a suspended driver's license in J. H. G. v Public Prosecutor[8]. The defendant's license had been suspended in the Netherlands. The defendant was riding in a car driven by another. As the auto passed the German border, the defendant took the wheel and began to drive. When he returned to the Netherlands, he was charged with driving in Germany with a suspended license. The appeals court ordered the prosecution dismissed, holding that the Netherlands Legislature can only lay down rules for traffic on roads in the Netherlands. Since the defendant did not drive in the Netherlands, he did not commit an offense against the laws of the Netherlands.

In Re Penati[9] concerned a Swiss citizen residing in Italy during World War II, who in Italy gave aid to the German occupation. He was convicted of treason but appealed, arguing that since he was not a citizen of Italy he could not be guilty of treason. The appellate court affirmed the conviction, deciding that " . . . the crime of favouring the political designs of the enemy [treason] can also be committed by an alien". The Court concluded that no nation could allow alien residents who enjoy its hospitality to carry out activities which are adverse to its vital military and political interests. Aiding the enemy in time of war was such an activity and punishable as treason notwithstanding the Swiss nationality of the accused. Thus, it was held that non-citizen residents owe a duty of allegience to the host.

In another Netherlands case[10], a Dutch citizen sent a defamatory letter to a man in London. The letter was mailed in the Netherlands but received and read in England. Charges were brought against the Dutchman in the Netherlands. The defendant argued that the offense had taken place in England, not the Netherlands; therefore, no jurisdiction to try him existed. The Supreme Court agreed that England proably had extraterritorial jurisdiction over the defendant but it was not exclusive. The Netherlands had jurisdiction, too, under the territorial principle, since the letter was posted in that country.

South Africa was faced with the applicability of its Stock Theft Act in 1953. Defendant Nel bought cattle from another in South Africa. The cattle had been stolen in Rhodesia. Upon conviction, Nel appealed. The defendant argued that the theft occurred in Rhodesia and, since the criminal jurisdiction of a nation is territorial in its operation, the Stock Theft Act was inapplicable. Finding that "stolen stock" is stolen stock, regardless of where stolen, the higher court affirmed the conviction on grounds the purchase was in South Africa and the Act made no distinction between cattle stolen one place or another. The offense was buying [or otherwise acquiring], <u>in</u> South Africa, cattle that were stolen.[11]

The Netherlands had yet another interesting question raised in a case involving Benders, an employee of a Netherlands bank before World War II. Two German Jews, in violation of German law, transferred the bulk of their fortune to the bank at which

Benders was employed in 1936. Benders disclosed this information to German authorities who held family hostages to force one of the brothers to return to the Netherlands, withdraw the funds, and bring the money back to Germany. The German government then confiscated the funds. After the war, the heirs sued Benders and the bank[12]. While not a criminal prosecution, the proceeding was based upon a purported criminal act by Benders, who got a substantial payment from German officials for his disclosure. Finding that " . . . execution of the design . . . began by the compilation of documents . . . " in the Netherlands bank, that the scheme was directed at a fortune in a Netherlands bank and that the bank, too, was injured, the trial court concluded that jurisdiction existed and the action could proceed. Ultimately, the trial court opinion was affirmed by the Supreme Court.

The 1929 S. S. Lotus case, decided by the Permanent Court of International Justice, created a major split among authorities on the application of the "Effects Doctrine".[13] France and Turkey submitted the case which was decided by the single vote cast by the President who votes only in cases of a tie vote.[14] The case arose from a collision on the high seas between the French steamer Lotus and the Turkish steamer Boz-Kourt. When Lotus arrived in Constantinople (now Istanbul) after the collision, Turkey arrested and charged one Demons, the officer on watch on Lotus at the time of collision, in connection with the death of eight Turkish sailors and passengers. Demons was a French citizen. France protested that Turkey had no jurisdiction under any international law principle to try Demons and that reparation should be paid to

him for the actions wrongfully taken. By agreement the matter was submitted to the International Court of Justice for adjudication.

First, the "World Court" held that no rule of international law prohibited Turkey from proceeding, as opposed to determining whether any rule of international law existed which authorized such action. Finding that none prohibited the Turkish action, the court majority held that the objective territorial principle could be adopted by Turkey if it desired. Although the acts of Demons were on a French vessel, the "effects" took place on the Turkish one. The matter was found to be a case of concurrent jurisdiction, since France also had authority to act against Demons. Because the principle of law adopted by Turkey was not in conflict with principles of international law, Turkey had the right to proceed against Demons and thus no damages were due to Demons.

The objective territorial principle or the "Effects Doctrine" was utilized in an India Supreme Court case involving the prosecution of Ali Ahmed, a citizen of Pakistan[15]. The defendant, while in Pakistan, obtained money from an Indian in Bombay by fraud. The defendant contended that he was not an Indian and had never before been in India; therefore, India had no jurisdiction over him. The India Supreme Court disagreed because of the effect in Bombay of the defendant's actions.

The European Economic Community, through its Commission, has determined that it had jurisdiction to order the Continental Can Company, Inc., of New York, N. Y., to terminate its unlawful

position of domination over fish canning and packaging markets in Europe.[16] Continental had come to dominate as a result of its ownership of a subsidiary German company. When Continental purchased 80% control of a competitor, the Commission assumed jurisdiction over the American company that, as an entity, did no business in Europe and ordered a divestiture of the competitor's stock.

In 1972, the Court of European Communities, to which EEC Commission decisions can be appealed, upheld several Commission decisions relating to restraint of trade by non-European corporations. Attorneys arguing for the Commission cited the "Effects" Doctrine as controlling. In ruling for the Commission and affirming fines which had been levied, the Court of European Communities justified its position on the ground that the non-European companies controlled subsidiary companies within the Common Market[17].

In Brown v. Old England Ship and Wagner[18], a British manufacturer of a leather polish brought suit in France against a Frenchman seller of an inferior product being marketed under a name very similar to the English product. Wagner, a German, was also sued and served in France. The Frenchman defended on grounds he bought the polish from Wagner in Germany and Wagner argued the French courts have no jurisdiction because he sold the product in Germany. The trial court upheld the Wagner position and dismissed. The appellate court reversed and found that jurisdiction existed. First, Wagner had shown samples of the product in France, and second, his actions in Germany caused the infringement results in

France. Thus, the "Effects Doctrine" had placed power to act in the French court in this civil fraud case.

In 1888, a citizen of the United States was the defendant in a Mexican case based on the objective territorial principle or, perhaps, the passive personality principle. Which principle Mexico sought to apply is unclear. Mr. A. K. Cutting of El Paso, Texas, published in Texas an alleged libel against a Mexican citizen. While visiting in Mexico, he was arrested and charged with libel. The Department of State dispatched a "strong letter of protest" to the Mexican government[19], urging his release on grounds that no theory of law vested jurisdiction in Mexico merely because the act done in the United States had allegedly damaged a citizen of Mexico. In arguing that Cutting must be released, Secretary of State T. F. Bayard stated, "There is no principle better settled than that the penal laws of a country have no extraterritorial force". The release of Cutting and payment to him of damages, as well as repeal of the statute on which the prosecution rested, were demanded by the Secretary. Neither request was granted. What might have occurred remains conjecture, however, because the Mexican plaintiff withdrew his charges and Cutting was released[20]. A similar United States - Mexico dispute arose in 1940. However, discussion of the 1940 dispute will be deferred to that portion of this paper dealing with the passive personality principle. Like in the Cutting matter, there is doubt as to which category the matter properly falls.

The territorial principle has also been used to obtain jurisdiction based upon the nationality of ships, airplanes and

military organizations. Under this theory, the sovereign authority follows the flag and attaches jurisdiction over those persons operating under the authority of the flag. Examples include crewmen and passengers on land and sea craft and soldiers, sailors and airmen members of a military unit operating in foreign lands. Apparently the flag theory of the territorial principle will suffice to extend jurisdiction for crimes committed in outer space to the nation of which the actor is a citizen.

The flag theory has been held to extend jurisdiction over nationals of another country, as well. An American seaman was on a British ship steaming along a French river well upstream from the sea. The American seaman killed another. Great Britain, not France, prosecuted and convicted him of manslaugher. On appeal[21], jurisdiction was upheld and the defendant Anderson was held subject to British criminal law while serving on the British ship.

2. THE NATIONALITY PRINCIPLE

As previously stated, the nationality principle rests upon the nationality or national character of the alleged offender. Different nations take different positions on the use of this principle.

In 1873, France was squarely presented with the issue of jurisdiction by nationality in the Arret Fornage case[22]. The defendant, alleged to be French, was charged with theft in Switzerland. He challenged jurisdiction on grounds that he was not a citizen of France and could not be tried for a foreign crime. The trial court failed to rule on his motion to dismiss on grounds of not being a French citizen, tried him and convicted him. He

appealed. The government argued that Frenchmen can be prosecuted for crimes committed in a foreign country because criminal law applies on both a territorial and a personal basis. The appellee conceded that a foreign national can be prosecuted for extraterritorial crimes only by his own country. The French Court of Cassation did not disagree with the government arguments but held for the appellant-defendant anyway. As the accused in support of his challenge to jurisdiction had alleged that he was born in France of foreign parents and that he had never claimed French nationality, the issue of jurisdiction was unresolved by the trial court's failure to hear evidence on and rule on the motion. If the accused was not a French citizen, jurisdiction did not and cannot attach in this case. The defendant's claim " . . . challenged the very legality of the prosecution . . . " and deserved to be heard on the merits. Trying the accused without a hearing and ruling on the jurisdiction issue violated his rights.

Switzerland also has asserted the nationality principle. In Kaiser and Attenhofer v. Basle[23], a 1950 case, Swiss citizens were convicted for crimes committed abroad. The Swiss Penal Code provided jurisdiction and extradition of Swiss nationals for crimes committed in a foreign country. On appeal, the defendants argued that the statute was not applicable unless the nation in which the offense occurred requested Switzerland to prosecute. The appeals court disregarded this argument and affirmed the convictions.

In 1952, a Dutch woman received the full measure of the Netherlands position. She was a citizen of the Netherlands but lost her citizenship by marriage. While married and in

another country, she committed a crime and was convicted for the offense by that country. Her marriage was subsequently dissolved and she regained Dutch citizenship. The Netherlands then prosecuted her for the same offense. On appeal,[24] the court held that any alien committing an offense abroad could be prosecuted by the Netherlands if that alien ever became a citizen of the Netherlands. This position probably discourages naturalization of citizens in the Netherlands.

Swiss justice was comparable in the ultimate holding in a 1946 bigamy case. An English woman, already married to an English man, proportedly married a Dutch citizen in England and lived with him in Holland. She was prosecuted for bigamy in the Netherlands.[25] The trial court found that her Dutch nationality was acquired simultaneously with the offense, not after the offense; therefore, she was acquitted. The acquittal stood but the prosecutor appealed the judgment to test the correctness of the trial court holding. The appeals court held that the trial court had erred. The statute applied without regard to whether she violated it before, after or during the time she became a citizen because nationality, whenever acquired, was the basis for applying the criminal sanction.

India, however, excludes jurisdiction if the offense committed abroad was committed prior to the time the accused acquires Indian citizenship.[26]

The nationality principle was applied in a Belgium adultery case.[27] The Belgian citizen committed adultery in Paris. He was charged in Belgium for the offense. The appeals court held

that the prosecution was for naught. The offense of adultery could be lawfully prosecuted in this situation only if the offense were committed against a Belgian national. [His wife was apparently Belgian; therefore, the offense of adultery was presumably committed against the Paris participant under this opinion but not against his wife. Thus, the "victim" was the temporary partner.]

Spain seems to have an identical rule - that is, a citizen of Spain cannot be prosecuted for crimes committed abroad unless the victim is also a citizen of Spain.[28]

Mexican statutes provide that offenses committed abroad by its citizens can be prosecuted in Mexico. For example,[29] one Guttierez stole a truck in Texas and was prosecuted in Mexico. His challenge to jurisdiction was dismissed due to this nationality concept of extraterritorial applicability of the Mexican criminal laws.

Many nations, as of 1935,[30] even though adopting the nationality principle, would not prosecute their own nationals for crimes committed abroad if they had otherwise been prosecuted for the crime. This appears to be an international overstatement of the concept of double jeopardy.

3. THE PROTECTIVE PRINCIPLE

The protective principle confers jurisdiction as a result of the national interest injured by the offensive act. Some cases illustrating the application of this principle to obtain extraterritorial jurisdiction follow.

Regina v. Page,[31] illustrates the English rule that crimes committed outside of the United Kingdom by British subjects are

generally not punishable by British courts. Modifications of the rule commencing with the reign of Henry VIII are mentioned and particular crimes prosecutable on an extraterritorial basis are listed in the Page case. These were treason, homicide, bigamy, and offenses against the Foreign Enlistment Act of 1870.

Another English case considered the question in 1956. One Owen and a codefendant were charged, inter alia, with conspiracy to defraud a department of the West German government. This charge, in Count 3 of the indictment, alleged that representations were made that metals to be exported from the Federal Republic of Germany were to go to and remain in Ireland when, in fact, they were destined for Communist East European countries. The defendants were also charged in Count 5 with conspiring to utter forged documents stating that the metals would go to Ireland and not be exported. Count 5 was affirmed but Count 3 was dismissed by the Court of Criminal Appeal and the House of Lords concurred in that result.[32] The Court of Criminal Appeal stated, "[A] conspiracy to commit a crime abroad is not indictable in this country unless the contemplated crime is one for which an indictment would lie here." The House of Lords agreed but reserved for future consideration whether jurisdiction would lie if the result of execution of the conspiracy would produce a "public mischief" in England or harm an Englishman by damaging him abroad.

One of the more famous English cases was Joyce v. Director of Public Prosecutions.[33] Joyce was a native born citizen of the United States, lived in Ireland from the ages of 3 to 21, that is, from 1921 until 1938. In 1933 he applied for and received a British passport by representing that he had been a British subject by

birth. The passport was renewed in 1938 and 1939 and expired in 1940. In late 1939, Joyce left England and went to Germany where he resided during World War II. He was charged with and convicted of high treason as a result of 1939 and 1940 broadcasts of propaganda on behalf of the German enemy. The House of Lords found that, although he was not a citizen, the application for and holding of the British passport, together with representing himself as a British subject in the broadcasts, was sufficient to affirm the conviction.

A British subject encountered the protective principle in the Union of South Africa a few years later. In August 1969, Dennis Higgs [34] was kidnapped from his residence in Rhodesia and was found bound and gagged in South Africa by South African officials the next day. Higgs was wanted there on charges dealing with sabotage and murder. The British government protested vigorously and argued that obtaining custody of Higgs by kidnapping was in violation of international practice. A few days later Higgs was returned to Rhodesia. Apparently, South Africa asserted jurisdiction over the crime under the protective principle but conceded that no jurisdiction over the person of Higgs existed since he was unlawfully taken from Rhodesia and brought unwillingly to the Union of South Africa.

Not so fortunate was another man who ran afoul of the Union of South Africa. Neumann was a German citizen, living in South Africa, becoming a naturalized citizen when World War II began. Neumann was serving abroad with the South African armed forces and was captured by the German Army. While a prisoner of

war, Neumann assisted his captors by interrogating other South African and Allied prisoners. After the war, he was charged with and convicted of treason. He appealed.[35] The conviction was affirmed, apparently on the protective principle because the national interest of South Africa was harmed by the conduct of Neumann, a German citizen.

A Belgian woman got equal treatment from a Netherlands court. She was a Belgian citizen, domiciled in Belgium. She was charged in 1950 with aiding Dutch nationals to violate Dutch currency laws. The Dutch trial court denied her motion to dismiss on lack of jurisdiction over her. The Court of Appeal affirmed and she appealed to the Netherlands Supreme Court.[36] Again, the conviction was affirmed. The Supreme Court held that the special provisions of the currency law were equally applicable to foreign nationals abroad who were accessories to such offenses.

4. THE UNIVERSALITY PRINCIPLE

Turkey and Italy are described as adopting the universality principle. (See endnote 39.) Under this concept, whichever nation has custody of a defendant can prosecute him regardless of where the crime was committed, but no cases substantiating this description can be found. The only case found which appears to fall into this category involves Israel.

Adolph Eichmann was tried in the District Court of Jerusalem in 1961. This was a very unusual case. Not only is the only apparent, possible grounds for jurisdiction the universality principle of possession of the body of the defendant, the war crimes charged against Eichmann were ex post facto in nature and

were committed at a time the State of Israel did not even exist.

Israel became a nation after World War II. After its creation, Israel enacted a Nazi Collaborators Law which provided the death penalty for anyone who did any of the following in a hostile country during World War II:

(a) did criminal acts against the Jewish people; or

(b) did an act constituting a crime against humanity; or

(c) did an act constituting a war crime.

Eichmann fled Germany at the end of the war but was kidnapped by Israelis in Argentina, brought back for trial in Israel, convicted and executed. In spite of the attack on the lack of territorial jurisdiction, pleading his foreign nationality and invoking ex post facto arguments arising from the nonexistence of Israel at the time of the alleged offenses, Eichmann was found by the trial court to be within Israeli jurisdiction. The Law of Nations and the right of Israel to punish were cited as legal basis for jurisdiction to attach. The Court also attempted to invoke the protective principle by concluding that the State of Israel was an effective link to the Jewish people. The Court also quickly disposed of the kidnap issue by citing international law which permits trial of an offender regardless of the means by which the accused is brought before the court. The Supreme Court of Israel, sitting as a Court of Criminal Appeals, affirmed the conviction[37].

5. THE PASSIVE PERSONALITY PRINCIPLE

Jurisdiction attaches under the passive personality principle by reference to the nationality or national character of the person injured by the offense. The Lotus case and the Cutting case, both of which are discussed in the territorial principle portion of the foreign countries part of this paper, may well have been based upon the personality principle.

As stated previously, Mexico had another, later case similar to the Cutting case. American citizen Richard Fiedler was taken into custody in Mexico City and charged with a crime alleged to have been committed in New Jersey. He was released pending trial and left the country. Even though Fiedler was out of Mexico, the US State Department lodged a protest similar to the Cutting one. The instruction to the American counsel general in Mexico was dated 9 February 1940 and challenged the legality of the statute in Mexico which purported to vest jurisdiction because a Mexican citizen was harmed by the extraterritorial conduct. The same grounds of complaint as in the Cutting case were voiced[38]. The letter argued that, under international law, penal laws of a nation have no extraterritorial jurisdiction except as to its own citizens.

Other cases and matters assigned to the foreign application of the territorial principle portion of this paper which might properly be construed to fall within the passive personality principle are Ali Ahmed v. The State of Bombay, supra, the Decision of 13 Dec 1971 by the European Economic Community Commission, supra, Imperial Chemical Industries, Ltd. v. European Economic

Community Commission, supra, and Brown v. Old England Ship and Wagner, supra.

SUMMATION OF
EXTRATERRITORIAL APPLICATION BY FOREIGN NATIONS

In attempting to classify nations according to their positions, J. L. Brierly in The Law of Nations[39] concluded that no problem existed as to offenses committed within the territory of a nation exercising criminal jurisdiction. Likewise, a nation could, if it desired, assume jurisdiction over criminal cases of its own citizens abroad, although all nations do not elect to do so. Difficulty arises in a nation trying to punish a foreigner for an extraterritorial act. Mr. Brierly found that the following nations belonged in the respectively designated categories:

1. The Territorial Principle:
   a. Great Britain
   b. United States
2. The Nationality Principle: by choice and none listed.
3. The Protective Principle:
   a. France
   b. Germany
   c. United States
   d. Perhaps a majority of nations of the world.
4. The Universality Principle:
   a. Turkey
   b. Italy

5. The Passive Personality Principle: None listed.

Assuming that the cases and matters cited hereinabove have been properly placed in a correct category or categories, the following listing of nations as to their positions on these principles is presented:

1. The Territorial Principle:
    a. Switzerland
    b. South Africa
    c. Turkey
    d. India
    e. France
    f. Mexico
    g. The European Economic Community Commission in cases carrying fines as penalties.
    h. Great Britain, when considering the territorial principle in view of the flag of the vessel upon which the offense occurred.
2. The Nationality Principle:
    a. France
    b. Switzerland
    c. Netherlands
    d. Mexico
    e. India
    f. Belgium, only if the victim is also a citizen of Belgium.
    g. Spain, only if the victim is also a citizen of Spain.

3. The Protective Principle:
   a. South Africa
   b. Netherlands
   c. Great Britain in offenses of treason, homicide, and bigamy and violations of the Foreign Enlistment Act.
4. The Universality Principle: Israel
5. The Passive Personality Principle:
   a. France
   b. Mexico
   c. India
   d. The European Economic Community Commission in cases carrying fines as penalties.

As is obvious, some overlapping and inconsistencies are evident in these listings. This apparent lack of conformity derives from either the invoking of inconsistent principles or the difficulty of this writer in interpreting the principle relied upon, or both. Hopefully, less of the latter than the former exist.

EXTRATERRITORIAL APPLICATION OF CRIMINAL STATUTES OF THE UNITED STATES

The United States has not been as ready to entend its criminal jurisdiction beyond its borders as have most of the nations of the world. However, in recent decades, trends have developed which have undercut the Cutting case assertion by the Secretary of State in 1888 that ". . .penal laws of a country have no extraterritorial force."

As early as 1821, in The Schooner Exchange v. McFaddon[40] the United States adopted the territorial principle as

". . .exclusive and absolute". Chief Justice Marshall, speaking for the Supreme Court, set the precedent that such geographical determination of sovereign authority could not be limited except by the sovereign itself.

In spite of early declarations to the contrary, the United States seems to have always extended, in theory at least, its jurisdiction in criminal matters in two areas. The first consists of the theory that sovereignty follows the flag on registered vessels[41] and to diplomatic enclaves such as embassies. Section 7 of Title 18 of the United States Code provides the present day authority for extraterritorial jurisdiction to attach on the high seas or in planes and other flying craft registered with the United States, as well as embassies and consulates. Although inferrentially accepted in concept since the inception of the nation, the first case on point did not occur until 1943. In United States v. Archer[42], the defendant was charged with violation of 22 U.S.C. 131 by falsely swearing in an application for a nonimmigrant visa that he had not applied before and had not previously been refused admission into the United States. The false statement was made in a U. S. Consulate in a foreign country but he was prosecuted in a United States District Court in California. In denying the defendant's motion to dismiss because of no jurisdiction, the Court stated, "Ordinarily, . . . no country may punish a crime committed extraterritorily by anyone but its citizens." In this case, however, the false statement was made by the alien defendant on the sovereign soil of the United States in the consulate; therefore, the false statement was made on United States territory and jurisdiction attached.

Also, extraterritorial jurisdiction to enforce criminal statutes against members of the armed services has been recognized since the birth of the nation. At present, Section 802 of Title 10 of the United States Code, entitled The Uniform Code of Military Justice, prescribes courts martial jurisdiction over the American soldier, sailor and airman regardless of where he goes. The only limitations on this power have been of recent origin[43] and are limited to some peacetime crimes committed within the boundaries of the United States and possible restraints resulting from status of forces agreements entered into by the United States and nations in which U. S. troops are stationed.

That the Congress of the United States has the power to attach extraterritorial effect to criminal statutes is a generally accepted proposition, although some disagreement appears to exist as to the source of such power. The Constitution, in Clause 10 of Section 8 of Article I, provides that Congress shall have power to punish offenses against the law of nations. This provision appears to have been intended and has been applied solely to prosecutions of citizens of the United States for offenses against other nations[44]. In U. S. v. Curtiss-Wright[45], the inherent power of Congress to legislate in the field of foreign affairs was relied upon for authority to permit extraterritorial effect of a federal statute. The U. S. v. Rodriguez case[46] also suggested that Congress has such power due to the inherent nature of sovereignty and the right of any nation to protect itself.

Granting the power of Congress to give criminal statutes extraterritorial application, the courts have limited the

extraterritorial effect of criminal statutes to those which contain expressed legislative intent[47]. In Blackmer v. United States[48], the Supreme Court said:

> While the legislation of the Congress, unless the contrary intent appears, is construed to apply only within the territorial jurisdiction of the United States, the question of its application, so far as citizens of the United States in foreign countries are concerned, is one of construction not of legislative power.

The premise upon which this strict construction of extraterritorial applicability of criminal statutes is based is the assumption that Congress is primarily concerned with domestic conditions[49].

The real problem in attempting to reach a proper construction arises because the statutes are usually silent on the topic of extraterritorial application. Because of this common ommision, the Supreme Court in United States v. Bowman[50] stated that the necessary locus depends upon the purpose of Congress

> . . . as evinced by the description and nature of the crime and upon the territorial limitations upon the power and jurisdiction of a government to punish crime under the law of nations.

The Court also said[51], however, that there is a class of criminal offenses which are not logically dependent upon the location of the criminal acts for jurisdiction to attach. This class is composed of the statutes providing criminal penalties which are enacted because of the right of the United States ". . . to defend itself against obstruction, or fraud wherever perpetrated. . . ." By their nature, some offenses were said to be capable of being committed only within the territorial limits of a government but

> [o]thers are such that to limit their locus to the strictly territorial jurisdiction would be greatly to curtail the scope and usefulness of the statute and leave open a large immunity for frauds as easily committed by citizens . . .in foreign countries as at home. In such cases, Congress has not thought it

> necessary to make specific provision in the [statute] that the locus shall include . . . foreign countries, but allows it to be inferred from the nature of the offense.

As an example of statutes giving rise to such an inference of extraterritorial scope, the Supreme Court cites[52] a then existing statute which made it a crime to steal or knowingly apply to one's own use property of the United States that was furnished or to be used for military service. Also, the extraterritorial application was justified because the three defendants, all citizens of the United States, were said to be. . . subject to such laws as [the Congress] might pass to protect [the United States] and its property."[53]

In Harlow v. United States[54], the defendant employees of the European Exchange System (EES) were accused of participation in a scheme involving the solicitation and receipt of bribes and kickbacks from certain vendors to the EES. The indictment charged the defendants with conspiracy to defraud the United States in violation of 18 U.S.C. 371 and alleged that each of the substantive counts was committed out of the jurisdiction of any particular state or district. The defendants did not even contest the Government's obvious contention that bribery offenses[55] of exchange employees were enforceable even though the alleged bribery occurred extraterritorily. Rather, evidently conceding this point by their tactics, the defendants urged the proposition that, since Germany was occupied by the United States and governed by the High Commissioner for Germany, who also established courts there, the acts complained of happened in a "district" of the United States and trial should be there. Even the defendants did not think much

of arguing that Section 202 did not have extraterritorial application. However, the court disagreed with the contention argued by the defendants, too. In discussing the meaning of the word "district" under the provisions of Section 3238 of Title 18 (the venue statute on crimes committed extraterritorially), the court stated, "We cannot believe that Congress meant to preclude the district courts from exercising jurisdiction over an offense against the laws of the United States simply because the acts . . . were committed. . ." in a country containing military or quasi-military tribunals. Quite clearly, the fact of jurisdiction, at least in violation of conspiracy[56] and bribery[57] statutes, existed in a United States District Court, even though the offensive acts occurred in a foreign country.

In Chandler v. United States[58], the defendant was convicted of treason. During World War II, he, in a foreign country, had broadcast propaganda for the Nazi government of Germany. The conviction was upheld, and the treason statute was thus determined to have extraterritorial application.

Our courts have traditionally sustained jurisdiction on the basis of the "territorial principle" which is in turn subdivided into the subjective and objective views. In the former case jurisdiction is said to extend to all persons in the state who there violate its laws, whereas in the latter view jurisdiction extends to all acts which take effect within the sovereign even though the actor be elsewhere. Rivard v. United States[59].

Also, in Strasshein v. Daily[60], the Supreme Court, in upholding a state bribery and fraud prosecution where the

defendant did not enter the state until after the completion of the crime, said:

> Acts done outside a jurisdiction but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm as if he had been present at the effect, if the state should succeed in getting him within its power.

Another theory that permits extraterritorial applicability of certain criminal statutes gaining wider acceptance by United States Courts was adopted by the Second Circuit in United States v. Pizzarusso[61]. Under the protective theory or principle, the Court reasoned:

> . . .a state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct outside its territory that threatens its security or the operation of its governmental functions, provided the conduct is generally recognized as a crime under the law of states that have reasonably developed legal systems.

Jurisdiction was found to exist under the protective principle to prosecute an alien for false statements in a visa application where admittedly the entire crime was committed abroad and, unlike the objective territorial principle, no showing of actual effect within this country was made.

In United States v. Cotten[62] the theory of extraterritorial application of two Federal criminal statutes was put into practical use. The two defendants were charged with conspiracy to defraud the United States[63] and theft of government property[64]. The defendants were civilian U. S. citizens in the Republic of Vietnam who conspired to defraud the government by converting money and other property of U. S. Military Exchanges in Japan to their own use. They obtained falsified military identification cards and falsified military orders authorizing "R & R" leave in

Japan and opened a modest bank account in the Chase Manhatten Bank at its branch in Cholon. While spending two weeks in Japan in 1969, they negotiated numerous worthless checks drawn on the cited account at several U. S. Military Exchanges. The checks were for cash and for merchandise which was sent through the military mail system to confederates in Vietnam. The court found that the "objective territorial principle" of international law, which condones jurisdiction of an offense committed elsewhere but taking effect within a nation that proscribes the conduct and asserts jurisdiction, was appropriate to apply. The United States was found to have a paramount interest in protecting its property wherever located, by enforcement of its penal laws. The only question remained was whether Congress intended that Sections 371 and 641 have extraterritorial application. Having reaffirmed the Bowman doctrine in a 1967 case[65], the Ninth Circuit held again that Section 371, conspiracy, was intended to have extraterritorial jurisdiction. Applying the Bowman rationale, the court found the theft of government property, Section 641, equally to have been intended to have extraterritorial applicability. Theft was found to be a statute of that class of proscriptions which is not logically dependent upon the locality of violation for jurisdiction. Further, the opinion cites legislative history of 18 USC 3238, the First-Found or First-Bought Venue Statute, as additional authority for the intent of Congress to apply the theft of government property statute extraterritorily. This statute was amended to provide a forum for prosecution of offenses which were already cognizable under the jurisdiction of United States District Courts. The legislative history indicates that theft of government property was considered

to be one of the offenses which required a forum prosecution. Consequently, the Cotten case held that Section 641 had extra-territorial jurisdiction and could be prosecuted in district courts of the United States when the offense was committed abroad.

As will be discussed in much greater detail hereinafter, Section 3238 of Title 18 of the United States Code was amended by Congress in 1963 by means of Public Law 88-27. In Report Number 146 [66], the Senate Committee on the Judiciary recommended passage of the pending proposed amendment and stated, inter alia, the following:

> The instant legislation is designed to cure two important defects in the present venue statutes. Its importance is underlined by the fact that with the spread of U. S. interests overseas, Federal crimes committed outside the United States have increased proportionately. Such crimes committed abroad may include treason, fraud against the Government, theft or embezzlement of Government property, bribery, etc., as well as conspiracy to commit such offenses.
>
> * * * *
>
> The committee is satisfied that the enactment of this legislation will sustain and implement a decision of the Supreme Court of the United States in United States v. Bowman (260 U.S. 94). In this decision, delivered by Chief Justice Taft, the Supreme Court of the United States held that citizens of the United States, while outside the United States, are subject to penal laws passed by the United States to protect itself and its property . . .

This report clearly reflected the congressional belief that certain criminal statutes already in the United States Code had extraterritorial applicability. By enactment of the cited amendment dealing with where such cases should be tried, the Congress unquestionably approved a continuation of the use of

such statutes.

Another source helpful to the task at hand is the Final Report of the National Commission on Reform of Federal Criminal Laws, Proposed New Federal Criminal Code (Title 18, United States Code), dated January 7, 1971. Section 208 of the Report reads in part as follows:

> Extraterritorial Jurisdiction.
> Except as otherwise expressly provided by statute or treaty, extraterritorial jurisdiction over an offense exists when:
> * * * *
> (c) the offense consists of . . .fraud against the United States, or theft of property in which the United States has an interest, or, if committed by a national or resident of the United States, any other obstruction of or interference with a United States government function;. . .

In the comments on this proposal, which immediately follow Section 208 on page 22 of the Report, the Commission states:

> Paragraphs (a), (b), and (c) of this section deal with protection of the federal government and its instrumentalities. Paragraph (c) is consistent in its breadth with the probable construction of United States v. Bowman, 260 U.S. 94 (1922).

The proposed language and the comments are harmonious with existing international law on the subject, as reflected by the hereinbefore discussed opinions. The proposal neither adds to nor reduces the present state of the law. The significance of the proposal is simply that it clearly states that extraterritorial jurisdiction already attaches to the offense of theft of Government owned property or property in which the United States has some other interest or an offense committed by a citizen of the United States that obstructs or interferes with a government function. Being a restatement of existing law, the Committee Report becomes additional authority for a conclusion that appropriate federal

criminal statutes can be applied extraterritorially.

The Mail Fraud Statute[67] has also been held to have extra-territorial effect when the matter is mailed from a foreign country to a place within the United States. Such was the holding in United States v. Steinberg[68] in which the mailing was posted in Canada and received in the United States.

SUMMATION OF EXTRATERRITORIAL APPLICATION OF CRIMINAL STATUTES IN THE UNITED STATES

From all of the above cited authorities, certain conclusions about the present status of law in the United States relative to extraterritorial jurisdiction of criminal statutes can be fairly drawn and can be summarized as follows:

1. A class of criminal offenses exists over which United States courts have jurisdiction because of the nations's right to defend itself from obstruction or fraud, regardless of where the illegal acts occur. Some crimes are characterized as being as easily committed by citizens of the United States in a foreign country as in the United States. [Does not apply to non-US citizens.]

2. Examples of such offenses are mail fraud[69], conspiracy[70], bribery[71], treason[72], theft of Government property[73], making a false statement in a visa application[74], and committing an offense within the confines of a United States embassy or consulate[75].

3. The intent of Congress that such statutes have extraterritorial effect can be reasonably inferred from its passage and amendment of Section 3238 of Title 18

of the United States Code. One of the apparent purposes of the amendment was to permit easier prosecution of violations of Federal criminal statutes in foreign countries; therefore, if easier prosecution was desired, then authority to prosecute must already exist. The proposal and comments in the Commission Report restating existing law confirms the existence of such intent. Authoritatively then, these cited criminal statutes of and offenses against the United States can be enforced extraterritorially and can be added to offenses occurring on the high seas or in the air in American vessels and crafts, and by American servicemen subject to courts martial prosecutions having extraterritorial applicability.

APPLICATION OF THE FIRST-FOUND OR FIRST-BROUGHT STATUTE

Having determined that certain criminal statutes of the United States have extraterritorial jurisdiction attached consistent with a view generally already held by other non-common law nations of the world, the practical question remains as to where should the accused be tried, i.e., what particular district court. The problem and its recognition is not one just now being confronted. Section 102 of Title 28 of the United States Code, 1940 edition, contained a forebear of the present language found in 18 USC 3238[76]. Prior to 1963, the statute read as follows:

> § 3238. Offenses not committed in any district
>
> The trial of all offenses begun or committed upon the high seas, or elsewhere outside of the jurisdiction of any particular State or district, shall be in the district where the offender is found, or into which he is first brought.

The statute rested upon the assumptions that the accused would commit his crime in an area without the country and then return to the United States or somehow be brought back, presumably for trial. If the accused were already here, he was to be tried in the court of the district in which he was "found", i.e., arrested. If brought back, the accused was to be tried in the court of the district at which his plane, ship or other means of transportation first brought him. Unfortunately, two problems continually confronted the Government in trying to apply the provisions of the statute.

Nothing was provided in the statute for an indictment. Thus, until the accused voluntarily returned to a district or was brought back by involuntary means, he could not be indicted. If a statute of limitations were applicable to the offense, the prospective defendant could merely remain outside of the United States and any of its districts and avoid being indicted. After the statute of limitations had run, the accused would have an ironclad defense and could flaunt his presence at will upon his eventual return.

Furthermore, if two or more actors committed the same offense together, the two would normally be tried together. If the actors were found or brought to different districts, each would have to be tried in the particular district in which he was found or brought and two or more trials of the same case would be required at great expense and inconvenience to witnesses and others.

Efforts by the United States Department of Justice to remedy the situation date at least back to 1956. On June 29 of that year, Rex A Collings, Jr., Chief of the General Crimes Section of the Criminal Division of the Department of Justice, testified

on behalf of H. R. 10786 which was being considered by Congress. With only a slight change, of no consequence in the issue at hand, the language being proposed at that time to amend Section 3238 of Title 18 was the same as that finally enacted in 1963. The Collings testimony was read from a prepared statement almost identical to every prepared statement read by Department of Justice representatives in later years before the amendment was finally passed. Portions of the Collings testimony are as follows:

> H. R. 10786 is designed to remedy two rather important defects in the present venue statutes.
>
> * * * *
>
> Section 3238 is often referred to as the "brought and found statute". It is one of the key venue provisions. It is under this section that the venue of the World War II treason cases involving such figures as Axis Sally, Tokyo Rose and Kamakita was determined. It was under this statute that the Government lost the Provoo case, (215 F.2d 531). As our bases and interests have spread throughout the world, so have our federal crimes. Examples of crimes which can be committed abroad are treason, fraud against the government, theft or embezzlement of government property, bribery, as well as conspiracy to commit such offenses. The venue of all such offenses is determined under Section 3238.
>
> Under the existing statute where joint offenders commit an offense abroad they must be tried separately if they are--as they usually will be--found in more than one judicial district. The term "found" for all practical purposes means "arrested".
>
> The proposed amendment will permit the indictment and the trial of joint offenders who commit offenses abroad in the district where any one is arrested or first brought.
>
> There is a second defect which H. R. 10786 is designed to remedy. Where an offender commits his offense beyond the bounds of the United States and continues to remain outside of the United States there is a serious question under appellate decisions as to whether he is a "person fleeing from justice". These cases require something in the nature of actual flight or leaving the jurisdiction to make one a fugitive. Of course if the offender is not a fugitive the statute of limitations will continue to run. The appellate

decisions to date indicate that a person who commits an offense outside of the United States and stays where he is will not be held to be a fugitive. See, e.g. Donnell v. United States, 229 F.2d 560 (5th Cir. 1956): United States v. Hewacker, 79 Fed. 59 (C.C. S.D. N.Y. 1896): United States v. Brown, 24 Fed Cas. 14,665 (D. Mass. 1873).

Let us suppose that an American citizen abroad steals Government property or bribes an American official and remains abroad. We cannot indict him because there is no venue under 18 U.S.C. 3238 (or any other statute) until he is either brought to the United States or found in the United States. Unless we can show that he is a fugitive the statute of limitations may run before he can be indicted.

H. R. 10786 would correct this situation by making it possible to indict such an offender in the District of Columbia. The reason for specifying the District of Columbia is of course to give us an out if the last residence is unknown.

Several questions were asked by members of the Judiciary Subcommittee following the reading of his statement. During this period, the following colloquy between Congressman Poff and Mr. Collings occurred[77]:

Mr. Poff. It is possible that since the first clause deals with the trial of offenses and the second clause deals with the indictment of offenders that an offender abroad might be indicted in one jurisdiction and when arrested and brought to this country with his co-offenders be tried in another jurisdiction in the United States?

Mr. Collings. Well, the government has no right to move for a change of venue. The only right to move for a change of venue is the defendant's right.

Mr. Poff. In other words, what you are saying is that having placed the indictment, that fixes the place of trial?

Mr. Collings. Unless for some reason it was decided to get a superseding indictment in the other jurisdiction, which could be done.

Mr. Poff. Well, then in effect this amendment not only enlarges the power of indictment but it expands the place of trial concept?

Mr. Collings. Yes, but for certain limited types of crime which are committed abroad.

Mr. Poff. Do not misunderstand me. I am in sympathy with the purpose you seek to attain, but we will have to be explaining this to the full committee, and we need the information for the record.

Mr. Collings. Yes, sir.

The above questions and answers clearly show that proponents of the amendment were of the opinion that, if the second clause (that following the semicolon) had to be used, the bringing of an indictment in a particular district also fixed that district as situs for the trial unless a superseding indictment were returned in another district. Since an objective of the proposed legislation was to limit to one the number of districts in which certain crimes, including fraud against the Government and theft of Government property, extraterritorily committed by more than one defendant, could be tried, such construction is consistent with this objective.

The proposed amendment was not enacted in 1956 but the language under consideration remained unchanged and eventually became law in 1963. Therefore, the opinion expressed before the subcommittee is very important in attempting to interpret the intent of Congress in the eventual passage of the amendment.

Another attempt to amend Section 3238 was made in 1959. Mr. James P. O'Brien was then serving as Chief of the General Crimes Section and made a presentation before the subcommittee very similar to the one made three years earlier. Of possible significance, however, is the information contained in a memorandum to file from Mr. Harold D. Keffsky, Head of the Legislative and Research Unit, dated March 4, 1959, in reference to H. R. 4154, the bill then considering amending Section 3238, and which is quoted below:

> I received a telephone call today from Mr. James Klein of the staff of the House Judiciary Committee. He told me the Committee wanted to make sure that venue would only be laid in the District of Columbia if residences of an offender or offenders could not be determined. I assured Mr. Klein that that was our intent but he wanted language to make it express. After talking to Mr. James P. O'Brien and Mr. Herbert Hoffman the following language was suggested to him:
>
> > but if such offender or offenders are not so arrested or brought into any district, an indictment or information may be filed in the district of the last known residence of the offender or of any one of two or more joint offenders, or <u>if residence is not known</u> in the District of Columbia. [Underlining new language.]
>
> Mr. Klein agreed with this suggestion.

Quite clearly, the concern over "venue" meant the place of trial and the Judiciary Committee wanted to prevent an offender from being <u>indicted and tried</u> in the District of Columbia rather than being <u>indicted and tried</u> in his home district if known. If venue only referred to the place of bringing an indictment, it would be of no consequence if the trial was going to be in the district in which the indicted defendant was arrested or first brought after voluntarily or involuntarily returning to the United States from a foreign country. The committee concern over this aspect of the legislation certainly indicates its interpretation of the alternative clause to be used when an accused was not physically in the United States at the time of bringing formal charges.

As stated, the proposed change was enacted in 1963. Unfortunately, no record can be found in which any consideration was then given to where a defendant would be tried if indicted in one district under the second provision of the amended statute and was later "arrested or. . . first brought" into another district. Because

of previous thought expressed on this possibility, the lack of any further consideration of this point can be explained on grounds Congress already looked upon the proposed two-sectioned law as an "either-or" statute, with the wording "an indictment . . . may be filed in the district of the last known residence of the offender" also meaning a trial in that district will follow as a matter of course upon apprehension of the offender and his return to the United States.

ISSUES RAISED BY ADDITION OF THE NEW LANGUAGE

After the amendment was added in 1963, Section 3238 read as follows:

> The trial of all offenses begun or committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district in which the offender, or any one of two or more joint offenders, is arrested or is first brought; but if such offender or offenders are not so arrested or brought into any district, an indictment or information may be filed in the district of the last known residence of the offender or of any one of two or more joint offenders, or if no such residence is known the indictment or information may be filed in the District of Columbia.

An accused could contend that the second portion of the statute, that language which follows the semicolon, is applicable only to the filing of an indictment or information. After an overseas defendant has been indicted, an accused might argue the first portion of the statute again comes into use. A defendant is either involuntarily returned from a foreign country and is "first brought" to the same district in the United States or he voluntarily returns and is "arrested" in whatever district he is found. In either case, an accused may say, he is

entitled to be tried in the district in the United States in which he is first formally apprehended and the indictment should be removed from the district in which it was returned to the district in which the defendant is "first brought" or "arrested".

The language contained in the first portion of the statute might be cited as mandatory and controlling in determining the place for the trial regardless of where the indictment was returned. Put another way, Congress provided a venue for bringing indictments and another venue for trying cases resulting from such indictments. Except for the word "shall" contained in the first portion and a word retained from the original statute, such an argument would have no basis whatever. Even with that wording, however, an application of the rule derived from such an argument reaches an absurd conclusion.

It is unreasonable to conclude that Congress would go to great pains to provide a system to designate a forum for initiation of a criminal indictment and simultaneously provide another system to designate yet another forum for trial of the resulting criminal case. If so, it would have been much simplier to merely designate one district in the United States, such as the District of Columbia, to bring all such indictments and provide for automatic transfer to the district where the defendant is "arrested" or is "first brought" when that occurs.

Going to the trouble to provide a system to insure the indictment of a defendant in a district from which he or another defendant is from, when the Government has knowledge of a last residence of him or any of them, Congress surely desired that

such a defendant be tried there. On the other hand, it might be persuasively argued that if Congress really wanted to prevent such an unreasonable result, it could have easily added a few words affirmatively stating that such a defendant could be both indicted and tried in the district of his (or a codefendant's) last known residence.

As shown, the wording of the present statute does provide some basis for such a contention. However, the unreasonable result an application of that contention would bring and the discussion before the House Judiciary Subcommittee appear to negate such a contention. Conceivably, two or more defendants could be indicted in the same district under the provisions of the added language and each of them, being "first brought" or "first found" in different districts, might file motions for change of venue to have separate trial in each of their first brought or found districts. The result would be multiple trials for joint offenders, the very problem Congress was attempting to eliminate by the amendment.

Consequently, the only reasonable conclusion on the question of where to indict and try one or more defendants in a joint criminal venture in a foreign nation over which United States courts have extraterritorial jurisdiction, is the same district in which one of them lived while in the United States or in the District of Columbia. Venue under the provisions of Section 3238 must be determined, an indictment returned and the trial held in the same district. To do otherwise would be to thwart the will and intent of Congress.

C O N C L U S I O N

This paper has attempted to survey the theories by which criminal statutes of nations have been applied extraterritorily. Particular concepts and cases resulting in the transposition of such theories into principles of law have been shown. Recent - that is, within the last few decades - judicial interpretations by United States courts broadening the application of criminal statutes beyond the nation's borders have been cited and discussed. Lastly, a review of the historical development of the venue statute in the United States for the trial of crimes committed abroad over which the United States criminal statutes apply was made.

Most nations of the world have less concern than the U. S. about legal niceties in this area. Under one theory or principle or another, most other countries find their criminal statutes have very long arms out of their countries. While somewhat belatedly, the United States seems to be catching up. Different theories or principles might be applicable from cases in other nations, particularly the civil law ones, but the results are more and more becoming the same - jurisdiction attaches. The federal venue statute may be a little confusing from a bare reading of its language but a close scrutiny of the Congressional history and intent reveals that the proper place for trying such crimes is clear.

With the enormous increase in activity by American citizens abroad since the United States attained the status of a world power,

the likelihood of additional expansion of the judicial power over more and more such activities which become criminal in nature appears inevitable.

FOOTNOTES

1. The Schooner Exchange v. McFaddon, 7 Cranch 116 (US Sup Ct, 1812); Kinsella v. Krueger, 351 U.S. 470 (1956).

2. Wilson v. Girard, 354 US 524 (1957).

3. United States v. Bazzell, 187 F.2d 878 (7th Cir., 1951), cert. denied 342 US 849.

4. United States v. Baker, 136 F. Supp. 546 (D.C., S.D.N.Y., 1956).

5. Harvard Research in International Law, Part II, Jurisdiction with Respect to Crime, 29 Am. J. Int'l L., Supp. 1, 435, 445 (1935).

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